# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

#### COMPLETE TITLE OF CASE

GENE E. DUDLEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

#### **DOCKET NUMBER WD77218**

### MISSOURI COURT OF APPEALS WESTERN DISTRICT

**DATE:** April 28, 2015

#### **APPEAL FROM**

The Circuit Court of Jackson County, Missouri The Honorable J. Dale Youngs, Judge

#### **JUDGES**

Division One: Welsh, P.J., and Newton and Mitchell, JJ.

CONCURRING.

#### **ATTORNEYS**

Susan L. Hogan, District Public Defender Kansas City, MO

Attorney for Appellant,

Chris Koster, Attorney General Shaun J. Mackelprang, Assistant Attorney General Jefferson City, MO

Attorneys for Respondent.



## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

GENE E. DUDLEY,		)
	Appellant,	) ODINION EILED.
<b>v.</b>		<ul><li>OPINION FILED:</li><li>April 28, 2015</li></ul>
STATE OF MISSOURI,		)
		)
	Respondent.	)

WD77218 Jackson County

**Before Division One Judges:** James Edward Welsh, Presiding Judge, and Thomas H.

Newton and Karen King Mitchell, Judges

Gene Dudley, Jr., appeals, following an evidentiary hearing, the denial of his Rule 24.035 motion for post-conviction relief. Dudley claims that plea counsel was ineffective for failing to call Dudley's father as a witness in mitigation at sentencing. But because Dudley failed to timely file his Rule 24.035 motion, or plead and prove any justification for the untimely filing, he waived his right to seek post-conviction relief. The untimely nature of Dudley's motion deprived the motion court of authority to review the motion on its merits, and the motion should have been dismissed.

#### JUDGMENT VACATED; REMANDED WITH DIRECTIONS.

#### **Division One holds:**

- 1. In a motion filed pursuant to Rule 24.035, the movant must allege facts establishing that the motion is timely filed, and he must then prove those allegations.
- 2. Despite the amended motion's allegation that the movant had twice attempted unsuccessfully to file a timely *pro se* motion, the movant failed to allege, or prove, *why* his attempted filings were not received by the court. Thus, he neither alleged nor proved that circumstances beyond his control, or negligence or misconduct by others, prevented his attempted filings from being successful.

3. Because the movant failed to plead and prove facts justifying the untimely nature of his *pro se* filing, the circuit court lacked authority to review the motion and should have dismissed it.

Opinion by: Karen King Mitchell, Judge

April 28, 2015

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